APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Action No. C-79-2781 RPA

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN, JERALD R. JAKL, LARRY R. JOHNSON, ANTHONY T. PELLEGRINO, individuals

Plaintiffs

v.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendants

OPINION AND ORDER

This is an action in which six installers employed by Western Electric Co., Inc. (Western) claim that certain personnel policies restricting employee movement within the Bell Telecommunictions System (the Bell System) violate

the antitrust laws. Each plaintiff sought transfer to the Pacific Telephone and Telegraph Company (Pacific), but transfer was denied based upon the so-called "no-switching" agreements between Western and Pacific, which are discussed more fully below. Plaintiffs have brought suit under §§ 1 and 2 of the Sherman Act.

Background.

The record before the Court establishes the following undisputed facts. American Telephone and Telegraph Company (AT&T) is the parent company of the Bell System. The Bell System is comprised of AT&T, Western, Bell Telephone Laboratories, and twenty-three operating telephone companies, including Pacific. AT&T owns and operates connecting telecommunications lines and together with the Bell operating companies furnishes nationwide

long distance service. Pacific, an 89.9% owned subsidiary of AT&T, provides telephone service within California. Western, which is wholly-owned by AT&T, manufactures telecommunications equipment for sale to the Bell operating companies, installs that equipment, and acts as a purchasing agent for the Bell System.

Plaintiff's Claims.

Section 1 of the Sherman Act makes unlawful "every contract, combination..., or conspiracy in restraint of trade." 15 U.S.C. § 1. Section 2 of the Sherman Act renders illegal the activities of "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize...." 15 U.S.C. § 2.

Plaintiffs' § 1 claim alleges that Western, Pacific, and AT&T have conspired to restrain trade or commerce by:

1. An agreement that Pacific would not consider for employment or employ any crafts employees of Western for any employment openings at Pacific;

2. An agreement that no crafts employee of Western would be hired by Pacific for a period of six months following said employee's separation from Western;

3. An agreement that no crafts employee would be hired by Pacific without Pacific first obtaining a release from Western; and

4. An agreement not to compete for each other's crafts labor force. (See Complaint at ¶ 18).

The Instant Motion.

Defendants bring this motion for summary judgment arguing that:

1. Defendants, as one unified

corporate structure, lack the ability to conspire as required by § 1;

2. Even if defendants possessed the ability to conspire, the alleged restraints are not actionable under § 1 because they are activities integral to the operation of the entire Bell System;

3. The alleged restraints affect only labor and hence are not actionable under the antitrust laws; and

4. The plaintiff employees lack standing to sue Western for monopoly offenses under § 2.

To dispose of this motion, it is only necessary that the Court discuss points 2 and 4.

The § 1 Claim.

Section 1 of the Sherman Act prohibits conspiracies in restraint of trade. To prove that such a conspiracy existed, the "concerted action of distinct

economic entities" must be established. Knutson v. Daily Review, Inc., 548 F.2d 795, 802 (9th Cir. 1976), cert. denied, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed. 2d 1094 (1977). Although a sole actor is incapable of conspiracy, a single corporate structure which is divided into distinct economic units may possess the ability to conspire. See Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951). ("Common ownership and control does not liberate corporations from the impact of the antitrust laws.") But "the mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy." Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 456 (9th Cir. 1977). See Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979). To determine

whether there exists sufficient corporate unity to render an organization incapable of conspiracy, "a court must examine the particular facts of the case before it." Las Vegas Sun, Inc. v. Summa Corp., supra, 610 F.2d at 617. "To 'conspire' within the meaning of the Sherman Act, corporate entities must be sufficiently independent of each other for their concerted action to raise antitrust concerns." Id. Even where a unified corporate structure has the requisite ability to conspire, however, there can be a violation of § 1 "only if the evidence shows their agreement or common action to lack a legitimate business purpose and to have an anticompetitive effect." Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F. Supp. 841, 860 (N.D. Cal. 1979). Where the alleged conspiracy is found to have a legitimate business aim, but is

also claimed to render an "incidental and indirect adverse effect upon the business of some competitors," the agreement is tested under the rule of reason. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1003 (9th Cir. 1972), cert. denied, 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed. 2d 256 (1973). See Las Vegas Sun, Inc. v. Summa Corp., supra, 610 F.2d at 619.

Since actions of affiliated companies which relate strictly to the internal operations of the common enterprise inherently have a legitimate business purpose and lack anti-competitive effects (because they are not directed at outsiders to the corporate family), such actions cannot constitute a § 1 violation. See Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Sukpp. at 860; In Re Penn Central Securities Litigation, 367 F. Supp. 1158,

1166 (E.D. Pa. 1973); REA Express v. Alabama Great Southern R. Co., 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976); Columbia Metal, Etc. v. Kaiser Alum, Etc., 579 F. 2d 20, 34 n. 49 (3d Cir. 1978). Of course, for there to exist matters of internal management, the related companies must satisfy a threshold test of affiliation. For example, Firm A and Firm B- totally unrelated by common control or operation- could not argue successful that a restraint effectuated by them was a matter of "internal management", for they are separate entities; their joint actions could never constitute the required "activities inherently connected with common ownership or control..." Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860. To determine whether companies are sufficiently connected to warrant a finding

that they are capable of engaging in affairs of internal management, the Court must consider the degree to which the enterprise's operations are integrated. If basic commonality or control and operation is suggested by this analysis, the threshold criterion is met. Such a finding depends not upon any patent formula, but upon an examination of the facts of each individual case. Cf., Las Vegas Sun, Inc. v. Summa Corp., supra.

The Court finds that Pacific, AT&T and Western are sufficiently affilitated to permit the further consideration of whether the challenged activities comprised matters of internal management. In Pacific Telephone and Telegraph Co. v. Franchise Tax Board, 7 Cal. 3d 544, 546, 102 Cal. Rptr. 782, 498 P.2d 1030 (1972), the California Supreme Court characterized the Bell System as "a

group of affiliated corporations engaged in a unitary communications business". The F.C.C. has held that the Bell System is "centrally managed by AT&T and the AT&T General Department" and that "virtually all important policies and practices are centrally developed, reach(ing) all parts of the Bell System." AT&T, 64 F.C.C. 1, 13 n. 21 (1977). The instant record evidences further and more specific rationale to treat the three defendants as members of a unified enterprise:

1. The Bell companies file a single consolidated federal income tax return;

2. It is the corporate policy of AT&T to represent itself as one unified organization, with all correspondence, facilities, etc., displaying the common Bell System logo (equipment manufactured by Western bears the engraved legend "Bell System property");

3. Research and development of products and services is coordinated by AT&T through Bell Laboratories for the whole system;

4. Training of management and non-management personnel is routinely conducted on a system-wide basis; and

5. Western and the operating companies loan both management and non-management personnel to one another on a routine basis.

Although there are other features which underline the intimate affiliation of the Bell companies, the above elements suffice to establish that AT&T, Western and Pacific are adequately related for them to have engaged in affairs of "internal management".

Given that the defendant companies are sufficiently affiliated for there to exist matters of internal management

within their enterprise, the Court finds that the challenged restraint is protected from the dictates of § 1 because it represents "an integral part of the operation of (the Bell System) and is a legitimate concern of those who own and control it."1/ Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860. The conduct challenged here, the structural deployment and coordination of manpower within the Bell System, is inherent to the organization's internal management.

1/The Court has chosen not to address the issue of whether the defendants had the ability to conspire. Assuming for the purposes of argument that defendants could have conspired, the Court has decided to focus upon whether the alleged conspiracy is actionable under § 1.

To require that manpower decisions be made totally independently, and to disallow coordination of policies among the companies, could seriously handicap operation of the Bell System.2/

2/"Common ownership or control of corporations will inevitably bring about communications, understandings, and common actions among them in areas reached by Section 1 such as production, distribution and price. Indiscriminate application of Section 1 to commonly owned or controlled corporations could therefore have absurd and counter-productive results, subjecting them to liability for 'automatically self-proving conspiracy' on account of activity necessarily arising out of or inherently connected with common ownership or control." Murphy v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860.

"Certainly, an inflexible approach requiring competition within a single business unit, although composed of legally separate entities would introduce chaos, not promote competition." Kitner, An Antitrust Primer, 30 (1964). Several cases support the Court's conclusion in their recognition that despite the existence of an ability to conspire among affiliated companies the exercise of the internal management function does not represent a cause of action under § 1. In Murphy Tugboat, for example, the court held that pricing was an "integral part of the operation..." and absolved two commonly owned and controlled corporations from § 1 liability. Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860. Similarly, the allocation of territories and markets among related companies in In Re Penn

Central Securities Litigation, supra, 367 F. Supp. at 1166, was held to be "merely internal management of a single business enterprise" and not actionable under § 1. See REA Express v. Alabama Great Southern R. Co., supra, 427 F. Supp. at 1166; Beckman v. Walter Kidde & Company, 316 F. Supp. 1321 (E.D.N.Y. 1970); Syracuse Broadcasting Corporation v. Newhouse, 319 F. 2d 683 (2d Cir. 1963).

The internal management rule is simply a gloss upon the § 1 requirement that to be actionable, a conspiracy must lack a legitimate business purpose and have an anti-competitive effect. See Murphy Tugboat v. Shipowners & Merchants Towboat, supra, 467 F. Supp. at 860; DuPont Glore Forgan, Inc. AT&T Co., 437 F. Supp. 1104, 1115-16 (S.D.N.Y. 1977). Exercise of internal management charac-

teristically represents a legitimate business aim. Moreover, such activity is not anticompetitive since its internality confines any impact within the corporate family. Activities inherently connected with common ownership or control by their very definition fall outside the single instance where the conspiracy of affiliated companies would be actionable under § 1: "where the conspiracty between the related corporations involves predatory or coercive conduct directed toward outsiders." Von Kalinowski 16 Business Organizations: Antitrust Laws and Trade Regulation, § 6.01(2), 6-37 (1980). See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) p. 34 ("Nothing (in the Supreme Court decisions) should be interpreted as justifying the conclusion that concerted action solely between a

parent and a subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates § 1"). Cf. Chastian v. AT&T Co., 401 F. Supp. 151 (D.D.C. 1975) (where the alleged conspiracy involved the Bell System's actions toward customers and competitors). The deployment and coordination of personnel within the Bell System were internal affairs, and not predatory practices. Hence, since the challenged restraints had legitimate business purposes and lacked anticompetitive effects, by virtue of their status as activities inherently connected with common ownership and control of the corporations, summary judgment on the § 1 claim must be granted.

The § 2 Claim.

A plaintiff lacks standing to sue in

antitrust unless his alleged injury fell within the "target area" of defendant's conduct. See In Re Multidistrict Vehicle Air Pollution M.D.L. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied, 414 U.S. 1045, 94 S. Ct. 551, 38 L.Ed. 2d 336 (1973). "...Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63, 92 S. Ct. 885, 891, 31 L.Ed. 2d 184 (1972). Where the alleged unlawful conduct is only remotely connected to the injury claimed by plaintiff, standing is to be denied. See John Lemore & Co. v. Olympia Brewing Co., 550 F. 2d 495 (9th Cir. 1977). It is well settled within the Ninth Circuit that employees lack standing to sue their employer under § 2 of the Sherman Act unless the labor or employment market is the tar-

get of the alleged violation. See Gutierrez v. E.& J. Gallo Winery Co., Inc., 604 F.2d 645 (9th Cir. 1979); Contreras v. Grower Shipper Vegetable Assn. of Central Cal., 1971 CCH Trade Cases ¶ 73,592, p. 90,452, affirmed per curiam, 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415 U.S. 932, 94 S.Ct. 1445, 39 L.Ed. 2d 490 (1974); Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed. 2d 377 (1979). Standing in such instances is denied because "the alleged conduct of the defendant, in its relation to these plaintiffs, is too remote..." Gutierrez v. E.&J. Gallo Winery Co., Inc., supra, 604 F.2d at 646. See Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951).

The above principles require the Court to deny plaintiffs' standing to sue

Western for its alleged monopolization of "the market for manufacture, distribution, sales and installation" of telephone systems. (See Complaint at ¶ 18). Plaintiffs' § 2 claim refers not to the labor market, but to a product market. Hence, Western's employees were not the target of the alleged violation. They did not compete with Western or purchase from it. Any injury they suffered "was merely incidental to the alleged antitrust violation and was not within the area of the economy that the defendant should have foreseen would be affected by its violation." Solinger v. A&M Records, Inc., supra, 586 F.2d at 1312. Accordingly, plaintiffs, as employees who fall outside the target area of the alleged violations, lack standing to sue under § 2.

Conclusion.

Careful examination of the record

reveals no facts to support plaintiffs' claims that defendants violated § 1 of the Sherman Act. Plaintiffs' "version of the facts (fails to) support a viable legal theory which entitles them, if accepted, to a judgment as a matter of law." Mutual Fund Investors v. Putman Management Co., 553 F.2d 620, 624 (9th Cir. 1977). See Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 672 (9th Cir. 1980) ("Summary judgment may be properly granted in an antitrust action on an allegation of conspiracy where there are understandable and legitimate business reasons for a defendant's conduct.") Although the Court is well aware that summary procedures in antitrust actions are to be exercised cautiosly, in "the absence of any significant probative evidence tending to support the complaint," a defendant's motion should be granted. First National

Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed. 2d 569 (1968).

Neither is the Court pursuaded that the plaintiffs have standing to sue under § 2 of the Sherman Act.

Accordingly, IT IS HEREBY ORDERED that defendants' motion for summary judgment on plaintiffs' claims is granted.

Robert P. Aguilar
United States District
Judge of the Northern
District of California

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Action No. 811-4190

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN, JERALD R. JAKL, LARRY R. JOHNSON, ANTHONY T. PELLEGRINO, individuals,

Appellants

v.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

OPINION

Before: Goodwin and Anderson, Circuit Judges, and Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

Goodwin, Circuit Judge.

Plaintiffs appeal from a summary judgment in favor of Western Electric, Pacific Telephone, and American Telephone and Telegraph Co.

The central issues are: (1) whether the defendants were entitled to judgment as a matter of law on plaintiffs' claims of violations of § 1 of the Sherman Act; and (2) whether the plaintiffs had standing to sue Western for alleged violations of § 2 of the Sherman Act. Six employees filed a private antitrust action in district court claiming that the defendants contracted, combined, and conspired to restrain interstate trade and commerce in violation of § 1 of 15 U.S.C. § 1. Specifically, the employees claimed; (1) that there was an agreement that Pacific would refuse to consider, to negotiate with, or to employ any craft person employed by Western, (2) that Pacific agreed with

Western not to employ any Western craft employee unless he or she resigned from Western and waited for six months; (3) that Pacific and Western agreed not to employ any craft person from Western without first seeking a release from Western; (4) that Pacific and Western agreed not to compete for craft employees of either company; and (5) these agreements were enforced by blacklists and refusals to deal.

The employees also claimed that Western violated § 2 of the Sherman Act, 15 U.S.C. § 2, by initiating and inducing the alleged contracts, combinations and conspiracies as an unlawful means of maintaining monopoly power in the sale of telecommunications services and telephone equipment. These claims were joined with a variety of pendent state claims asserting various theories of recovery.

In granting summary judgment on the antitrust claims, the court also dismissed the pendent state claims without prejudice.1/

Generally, summary judgment is disfavored in "complex antitrust litigation where motive and intent play leading roles..." Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962). Accord, Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 668 (9th Cir. 1980). Harvey v. Fearless Farris Wholesale, Inc., 589 F. 2d 451, 454 (9th Cir. 1979).

1/ Plaintiffs also alleged that the agreement, between AT&T, Western, and Pacific violated Section 7 of the California Constitution and constituted intentional interference with prospective economic advantages. The district court's ruling on the state law claims has not been appealed.

Poller does not, however, preclude summary disposition of antitrust cases. First Nat. Bank v. Cities Service, 391 U.S. 253, 290 (1968). This court has said, in connection with applying Fed. R. Civ. P. 56(c) to antitrust cases:

> "Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendant becomes proper." Mutual Fund Investors v. Putman Management Co., 553 F.2d 620, 624 (9th Cir. 1977) quoting ALW, Inc. v. United Airlines, Inc., 510 F.2d 52, 55 (9th Cir. 1975).

Accord: Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d at 454.

In granting summary judgment on the § 1[2]/ claims, the district court found the

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2/ Section 1 of the Sherman Act, 15 U.S.C. § 1 provides:

> "Section 1. Trusts, etc., in restraint of trade illegal; penalty
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> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

employment restraints to be protected from antitrust liability because AT&T, Pacific and Western are so closely affiliated within the Bell System as to make employment policy a matter of internal management. AT&T owns 100 percent of the shares of Western and 90 percent of the shares of Pacific.

A conspiracy requires a "plurality of actors concerting their efforts toward a common goal". Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 625 (9th Cir. 1977). Common ownership and control will not insulate corporations from the impact of antitrust laws if they "hold themselves out as competitors". Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 215 (1951). Accord: Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134, 141-142 (1968); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947); William

Inglis v. ITT-Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d at 456. However, the mere fact of separate incorporation, without more, is not "sufficient to prove the capability of conspiracy".

On the capacity of intra-enterprise entities to conspire, this court has held that there is a single "business unit separated by the technicality of separate incorporation" where the parent and subsidiary corporations are controlled by a single individual. Knutson v. Daily Review Inc., 548 F.2d 795, 802-03 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977). Two factors in Knutson are arguably made the corporations legally incapable of conspiracy, (1) common ownership and discretion and (2) lack of intra-enterprise competi-

tion.3/ See also Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F. Supp. 841, 858, affirmed sub nom, Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981). "To determine whether cor-

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3/ Murphy Tugboat v. Merchants Towboat, 467 F. Supp. 841, 859 n. 15, affirmed sub nom, Murphy Tugboat v. Crowley, 658 F.2d 1256 (9th Cir. 1981), indicates that there is some confusion over who should determine the capacity issue:

> "The capacity issue was submitted by the Court to the jury, which apparently encountered great difficulty in dealing with it. On reflection, it seems to the Court to be more of a legal than factual issue (at least where, as here, none of the relevant facts are disputed) and hence more properly resolved by the Court, but there appear to be no reported decisions on this question."

It is not necessary to reach this question in this case.

porate entities are separate enough to be capable of conspiracy, a court must examine the particular facts of the case before it." Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617, cert. denied, 447 U.S. 906 (1980).

Even if appellees possessed the capacity to conspire, the personnel agreements in questions do not violate § 1 if the corporate entities are sufficiently affiliated for the matter to be one of internal management. See William Inglis v. ITT-Continental Baking Company, 668 F.2d 1014; Murphy Tugboat Co. v. Crowley, 467 F. Supp. at 860. Thus, actions of affiliated corporations which touch only on internal operations and have no anti-competitive consequences cannot violate § 1.

The evidence that AT&T, Western and Pacific constituted a "common enterprise"

is overwhelming. (1) The FCC has held that Bell System was "centrally managed by AT&T". The parent company, "virtually sets all policies and practices" in the Bell System. AT&T, 64 F.C.C. 2d 1, 13, n.21 (1977). See also Pacific Telephone and Tel. Co. v. Franchise Tax Board, 102 Cal. Rptr. 782 (1972). (2) The Bell System filed a single, consolidated federal income tax form. (3) AT&T had a corporate policy of representing itself and the other Bell companies as a single enterprise with a common logo ("The Bell System"). (4) Bell laboratories develop products and services for the entire system. (5) Western and local operating companies continuously lend management and nonmanagement personnel. (6) Labor negotiations between the Bell companies and the union, the Communications Workers of America, were conducted on a systematic

basis. The plaintiffs present no plausible evidence to counter the district court's findings and conclusions.

The employment agreements did not involve anyone outside the "corporate family". The companies had no policy concerning the movement of skilled employees outside the Bell System. "Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated." Report of the Attorney General's National Committee to Study the Antitrust Laws 34 (1955). We agree.

This case is essentially an effort to turn a labor dispute into an antitrust action for treble damages. The plaintiffs wanted to change employers with all their seniority and benefits intact. The proper place for a dispute of this kind is

at the bargaining table between Bell and its employees' union. The defendants raised the labor exemption to the anti-trust laws as a defense in the district court but the district court did not address this argument and we need spend no more time on it.

C. Standing Under Section 2

The district court also found that the plaintiffs lacked standing under § 2 of the Sherman Act4/, because their

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4/ Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> § 2. Monopolizing trade a felony; penalty
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> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony,

alleged injury did not fall within the target area of defendants' conduct. In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1973). The plaintiffs had alleged that Western monopolized the market for sales, distribution, manufacture and installation of telephone systems. The district court found that the allegation referred only to the product market and not the labor market. The employees did not compete or purchase from Western, so they were

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> and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

not the target of the alleged violation. Any injury suffered was incidental.

The employees also attempted to tie the § 2 claim with the § 1 claim. This court has said that a § 1 claim insufficient to withstand summary judgment cannot be used as the sole basis for a § 2 claim. Bushie v. Stenocord Corporation, 460 F.2d 116, 121 (9th Cir. 1972).

A further infirmity in the § 2 claim is the absence of a causal connection between the alleged monopolization and the personnel policies. In Ostrofe v. Crocker, 670 F.2d 1378 (9th Cir. 1982), the court stated that an employee dismissed because he refused to participate in a conspiracy to rig prices and allocate customers has standing to bring a private treble damage action against the employer under § 4 of the Clayton Act, 15 U.S.C. § 15. But Ostrofe does not

help plaintiffs in this case. There is no discernible causal connection between the alleged injury (monopolization of telecommunications services and equipment) and the personnel agreements attacked under § 1. Limitations on the mobility of skilled labor within the Bell System do not affect Western's alleged monopolization. Indeed, these limitations may make workmen more available to competing companies. This result would be procompetitive. Accordingly, contriving standing in this case would accomplish nothing to further enforcement of the antitrust laws.

AT&T, Western and Pacific are closely affilitated to comprise a common enterprise. The personnel agreements challenged by these plaintiffs are matters of internal policy with no anti-competitive effect on those outside the corporate

family. The district court's summary judgment on the § 1 claims is affirmed. Because plaintiffs lacked standing to sue under § 2 and because the alleged monopolization is not causally related to the injuries alleged, summary judgment on the § 2 claim is also correct.

Affirmed.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Action No. 811-4190

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN, JERALD R. JAKL, LARRY R. JOHNSON, ANTHONY T. PELLEGRINO, individuals,

Appellants

v.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Appellees.

ORDER

Before: Goodwin and Anderson, Circuit Judges and Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge called for a vote on whether to rehear the case en hanc.

The petition for rehearing and the suggestion for rehearing en banc are denied.

Dated: August 17, 1982.

APPENDIX D

Section 1 of the Sherman Act, 15. U.S.C. § 1, states:

> "§ 1. Trusts, etc., in restraint of trade illegal; penalty
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> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

APPENDIX E

Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

> "§ 2. Monopolizing trade a felony; penalty
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

APPENDIX F

Section 4 of the Clayton Act, 15 U.S.C. § 15, states:

> "§ 15. Suits by persons injured; amount of recovery
> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."